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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-625

FRANK STARR,

*Petitioner,*

*vs.*

THE STATE OF NEW JERSEY,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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THE STATE OF NEW JERSEY,

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The Petitioner, Frank Starr respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of New Jersey denying petitioner's Petition for Certification entered in this proceeding on September 19, 1973.

### Opinion Below

The opinion of the Appellate Division of the State of New Jersey appears in the Appendix hereto. No opinion was rendered by the Supreme Court of New Jersey.

## Jurisdiction

The judgment of the Supreme Court was entered on September 19, 1973. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

## Questions Presented

1. Whether the breaking of the door to Petitioner's home and the failure of the police to announce themselves violated the Fourth Amendment of the United States Constitution and rendered the subsequent search illegal.
2. Whether the Fourteenth Amendment to the United States Constitution was violated by the Court's failure to set forth any reasons for the sentence imposed upon the petitioner and by the fact that prior to the Imposition of Sentence the Attorney General sent an ex parte letter to the Court.

## Statement of the Case

On December 18, 1970, members of the New Jersey State Police executed a search warrant at 16 Romaine Avenue, Jersey City, New Jersey. The officers did not announce themselves but broke the door of the apartment. The search warrant did not direct the breaking of the door and the failure to announce themselves as policemen. Upon entering the apartment, the State Police observed the petitioner's wife and daughter seated on a couch. A racing form and various papers with lottery and horse bets and an adding machine was found in the room. Subsequent to the search, a son-in-law of the peti-

tioner entered the apartment, thereafter, the petitioner arrived; no gambling material was found in the possession of petitioner or his son-in-law.

The Grand Jury returned two indictments charging Frank Starr and others with the violations of the gambling laws. Indictment 14B in three Counts charged that Frank Starr engaged in lottery business, possessed lottery paraphernalia and maintained a premises for gambling purposes. Indictment 14C and D charged the defendant and others with conspiracy to engage in bookmaking. In addition, Indictments 14C and D in separate Counts charged Frank Starr with bookmaking on horse races; bookmaking on sporting events; and maintaining a premises for the purpose of gambling.

Prior to trial a Motion to Suppress evidence siezed on violation of the Fourth Amendment was made. The motion was heard on the stipulated facts: that the officers, following state police policy, neither knocked nor announced themselves as they entered the apartment. This motion to suppress evidence was denied.

On May 8, 1972, the State moved the indictments for trial. The State elected not to proceed on the conspiracy charge; this was dismissed. At the conclusion of the State's case the Court granted Frank Starr's Motion for a Judgment of Acquittal, on the charges of bookmaking on horseracing, bookmaking on sporting events and engaging in a lottery operation. The Court denied Frank Starr's Motions for Acquittal on the charges of possession of lottery slips and maintaining a premises for gambling purposes. On May 9th, 1972, a jury returned a verdict of Guilty on these two charges.

Prior to the imposition of sentence on June 29th, 1972, the Attorney General sent a letter to Judge Crahay, rec-

ommending that a custodial sentence be imposed upon the defendant. No copy of this letter was sent to defense counsel. The Court then imposed a sentence of not less than two and not more than three years in New Jersey State Prison on each count of the indictment. These sentences were to be served concurrently. In addition, a fine of $1,000 was imposed on each count. The Court did not set forth any reasons for the sentence it imposed. When the defendant's attorney questioned the propriety of the conduct of the Attorney General and the sentencing court, the Attorney General's Office again went to Judge Crahay ex parte and obtained an affidavit from him concerning the sentence he imposed.

## Reasons for Granting the Writ

### 1. The decision below conflicts with the decisions of the United States Supreme Court as to the Proper Interpretation of the Fourth Amendment to the United States Constitution.

There were no particular facts in the present case that were presented to the Magistrate or known to the arresting officers that evidence was about to be destroyed. If this search is upheld, then the Court is approving the policy of the state police. That policy was and is for the police to break down the door and not announce themselves in all gambling cases.

The breaking of a door is in general, so violent and dangerous a proceeding that it should be adopted only in extreme cases, where an immediate arrest is requisite. 1 Burns, *Justice of the Peace and Parrish Officer,* 105 (15th Ed. 1785). This principle of the common law has been reflected in the command of the Fourth Amendment. *Miller* v. *United States,* 357 U.S. 301 (1958).

The fact that the officers possessed a Search Warrant did not grant them greater license to break into the apartment. *Miller* v. *United States* supra 306. The Supreme Court further indicated that no matter what the circumstances under which breaking a door might be lawful, the breaking is unlawful where the officer fails to state his authority and purpose for demanding admission. See *Keningham* v. *United States,* 287 F. 2d 126 (D. C. Cir. 1960); *Gatewood* v. *United States,* 209 F. 2d 789 (D. C. Cir. 1953). There were no exigent circumstances that warranted breaking in the door. *United States* v. *Frierson,* 299 F. 2d 763 (7th Cir. 1962).

As a recent commentator noted, normally, only the facts of a particular case indicating the occupants were prepared to destroy evidence whenever a stranger knocked, would justify a "no-knock entry." *Destruction of Evidence,* 84 Harv. L. Rev. 1465, 1497 (1971).

Beyond constitutional considerations, practical reasons militate for the rule requiring the officers to announce their presence before breaking into an apartment. Innocent persons should not be frightened or embarrassed by the unannounced police intrusion. Secondly, the requirement of an announcement minimizes the danger to an officer from a citizen seeking to protect himself from what he believes to be a housebreaker. See *McDonald* v. *United States,* 335 U. S. 451, 460-461 (1948). (Concurring opinion Justice Jackson).

The risks, humiliations and outrages that occur when the police burst into doors without announcing themselves are not limited to this case. This was graphically demonstrated only recently. See New York Times, January 15, 1973, p. 14 and Editorial, New York Times, January 16, 1973, p. 38.

**The recent events of Watergate, in Washington, D. C., the Daniel Ellsberg trial in Los Angeles, California and the search in Winthrop, Massachusetts, should cause the Court to reflect before it gives its stamp of approval to measures that further limit the integrity of the individual.**

The decision of the trial court denying the Motion to Suppress the evidence; the Appellate Court's affirmance of that decision; and the denial of the petition for certification should not be viewed in a vacuum. They are the product of a policy of the New Jersey Supreme Court which has destroyed the Fourth Amendment in New Jersey. United States Supreme Court decisions suppressing evidence have been criticized in strong and biting tones, *State* v. *Boykins,* 50 N. J. 73, 81 (1967), *State* v. *Bisaccia,* 58 N. J. 586 (1971). In the latter case the history of the Fourth Amendment was misinterpreted to justify the State Court's analysis. The New Jersey Supreme Court has exhorted trial courts to resolve all doubts in favor of sustaining searches, *State* v. *Kasabucki,* 52 N. J. 110, 116 (1968).

The New Jersey Supreme Court has denigrated the right to be left alone in favor of an unsupported fear of discouraging law enforcement officers from carrying out their duties. By refusing to invalidate illegal searches the New Jersey Supreme Court has not only failed to vindicate individual liberties but has lost the opportunity to strengthen the administration of justice by promoting respect for law and order and encouraging law enforcement officers to follow the proper constitutional course. See, *Ventresca* v. *United States,* 380 U. S. 102 (1969).

**2. Sentencing of petitioner did not comport with due process of law.**

The Court failed to set forth any reasons for its sentence. Sentencing procedure must comport with due process of law. *Mempa* v. *Rhay,* 389 U. S. 128 (1967); *Townsend* v. *Burke,* 334 U. S. 736 (1948). The Court gave no reasons for imposing its harsh Sentence on Frank Starr who had no prior involvement with the law. A decision to impose a deprivation of liberty is the paradigm of a decision which should be rationally defensible by an appeal to articulated and intelligible principles. *Due Process in Sentencing,* 81 Harv. L. Rev. 821, 843 (1968). If a defendant, has a right to be sentenced on the basis of intelligible principles, then for this right to be enforcible these principles must be articulated. The Court must give a brief account why it imposed the particular Sentence.

Compelling the Court to set forth its reasons has numerous justifications. It insures that the Court has relied on proper materials in imposing Sentence *State* v. *Leckis,* 79 N. J. Super. 479, 487 (App. Div. 1963); *State* v. *Gattling,* 95 N. J. Super. 103, 111 (App. Div. 1967). Requiring an opinion forces the Court to think about the principles it is relying upon to reach its sentencing decision. This contributes to the rationality of the sentence. Wyzanski, *A Trial Judge's Freedom and Responsibility,* 65 Harv. L. Rev. 1281, 1292 (1952).

The Court's comments or reasons may contribute to the deterrent force of the sentence. There is a social interest in allowing the community to know that the man has been treated fairly. Perhaps of even more fundamental importance is the respect for the individual which is essential in a democratic society. Setting forth reasons

for a sentence indicates the judicial system has confidence in the justness of its judgment.

Finally a statement of reasons concerning the sentence is necessary to facilitate review by the Appellate Court. It is questionable how meaningful review can occur when the Appellate Court has not been told of the reasons for the sentence. *Appellate Review of Sentences,* (A.B.A. Ten ed. 1967) p. 47, *Kent* v. *United States,* 383 U. S. 541, 562 (1966).

The Appellate Division in its opinion has in effect ignored the issue raised by defendant. The Court said:

> "As to Defendant's objection, that no reasons were given for the sentence imposed, no case law or rule mandates that reasons be given"

There never will be any case law on the subject, unless a court faces the issue. The law would remain static, if all courts refused to decide an issue because there was no prior case law. The failure to set forth reasons goes to the very heart of the legal process. As Lon Fuller, in, *The Morality of Law,* p. 159 (Yale 1964) said:

> "Even if a man is answerable only to his own conscience, he will answer more responsibly if he is compelled to articulate the principles on which he acts."

> Due Process of Law was violated by the ex parte communication between the State and the Court.

Due process was also violated when the Attorney General's Office made an Ex Parte communication to the Court concerning its position on the sentencing of Frank Starr. Defense Counsel called to the Court's attention that he had not been given a copy of this letter. This type of com-

munication to the Sentencing Court was condemned by the Court in *Haller* v. *Robbins,* 409 F. 2d 857, 859 (1st Cir. 1969).

> "Not only is it a gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the Court, it is a dangerous procedure."

This action by the Attorney General violated the spirit of *State* v. *Kunz,* 55 N. J. 128, 145 (1969) which held that the defendant should be furnished with a copy of any material that has a bearing on his Sentence.

The sending of the letter by the Attorney General and the acceptance by the Court without revealing the contents to defense counsel violated both judicial and legal ethics. *Canons of Judicial Ethics No. 17,* specifically states that a Judge should not permit private communications designed to influence his actions. Similarly the *Code of Professional Responsibility,* E.C. 7-35 provides that a lawyer should not communicate with a tribunal by writing unless a copy is delivered promptly to opposing counsel. Failure to comply with this ethical consideration subjects the Attorney to disciplinary proceedings, *Code of Professional Responsibility,* D.D. 7-110.

Subsequent to the imposition of sentence and while the matter was pending on appeal, the Attorney General again ex parte appeared before the sentencing judge and obtained an Affidavit concerning the Court's position.

In May, 1972, the American Bar Association Project on Standards for Criminal Justice wrote:

> "The trial judge should insist that neither the prosecutor or defense counsel . . . discuss a pending case with him ex parte, except after adequate notice

> to all other parties." *The Function of Trial Judge*, p. 34 (A.B.A. 1972).

Canon 17 of the Judicial Ethics specifically states that a Judge should not permit private communications designed to influence his actions.

Despite the fact that defense counsel alerted the Attorney General, who, in turn confessed to the Court in his appellate brief, that he had violated the Canons of Ethics during the sentencing procedure, the Court and the Deputy Attorney General continued their improper collaboration. They attempted to facilitate the State's position by submitting the Court's affidavit, this was once again done ex parte without even notice to defense counsel. It is difficult to accept the conclusion that is seemingly being forced upon us: that the Canons of Ethics do not apply to Deputy Attorney Generals and Assignment Judges. As Justice Brandeis ringingly declared in *United States* v. *Olmstead*, 277 U. S. 438, 485 (1927).

> "Our Government is the potent, omnipotent teacher. For good or ill, it teaches the whole people by its conduct . . ."

The impropriety of the conduct displayed in this case is equalled by the intellectual bankruptcy of the sentencing procedure.

## CONCLUSION

**For these reasons, a Writ of Certiorari should issue to review the judgment of the Supreme Court of New Jersey.**

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# APPENDIX A

**_Per Curiam_ Opinion of the Superior Court of New Jersey, Appellate Division**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2875-71

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THE STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRANK STARR,

Defendant-Appellant.

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Argued March 26, 1973—Decided May 31, 1973.

Before Judges LEWIS, CARTON and MINTZ.

On appeal from Monmouth County Court.

*Mr. Gerald D. Miller argued the cause for appellant* (*Messrs. Miller, Hochman, Meyerson & Miller,* attorneys).

*Mr. Edward Roy Rosen,* Deputy Attorney General, argued the cause for respondent (*Mr. George F. Kugler, Jr.,* Attorney General of New Jersey, attorney).

PER CURIAM

*Appendix A*

**Defendant appeals his convictions for maintaining a gambling resort and possession of lottery slips, contending that: (1) the trial judge erroneously denied his motion for acquittal at the end of the State's case; (2) his motion to suppress was erroneously denied; (3) his sentencing was not conducted in a manner comporting with due process. For each offense defendant received a sentence of 2-3 years, to run concurrently, and a $1000 fine.**

The evidence at the close of the State's case showed that defendant lived with his wife, a co-defendant, in their residence in which gambling paraphernalia and lottery slips were found pursuant to a search warrant. Defendant's wife told the officers who executed the warrant that the materials were hers. Although defendant was not present when the raid occurred, he returned home upon being summoned and told the officers that he lived there. Under these circumstances, the jury could infer that defendant had possession and control of the premises and of the contraband seized therein, and that he must have known of the lottery activities conducted there. Compare *State* v. *Boiardo,* 111 N. J. Super. 219, 241 (App. Div. 1970), certif. den. 57 N. J. 130 (1970), *cert. den.* 401 U. S. 948 (1971), and *State* v. *Puryear,* 94 N. J. Super. 125, 129-132 (App. Div. 1967), rev'd on other grounds, 52 N. J. 81 (1968). Consequently, the motion for acquittal at the end of the State's case was properly denied. *State* v. *Fiorello,* 36 N. J. 80, 90-91, *cert.* den. 368 U. S. 967 (1962).

Defendant next contends that his motion to suppress should have been granted because the officers knocked down his door in executing the warrants. While *Miller* v. *United States,* 357 U. S. 307, 78 S. Ct. 1190, 2 L. Ed. 2d 1332 (1958), does in certain circumstances require sup-

pression when a door is broken down, it does not mandate suppression when a knock and an announcement of purpose could result in destruction of incriminating evidence. See *State* v. *Juliano,* 97 N. J. Super. 28, 32 (App. Div. 1967), modified on other grounds 52 N. J. 232 (1968); *State* v. *Smith,* 37 N. J. 481, 499-500 (1962), *cert.* den. 374 U. S. 835 (1963); *State* v. *Fair,* 45 N. J. 77, 86 (1965). Evidence of gambling can be easily destroyed; thus a failure to knock and announce cannot be considered fatal.

Lastly defendant contends that his sentencing was not conducted in compliance with due process because the State communicated with the sentencing judge as to the sentence it felt was appropriate without advising defendant and because no reasons were advanced for the sentences imposed. The State violated *Code of Professional Responsibility* DR7-110 (B) (2) when it communicated with the court without sending a carbon copy of its letter to defense counsel. However, the only harmful portion of this letter states, "This was an illegal gambling case and it is the State's position that a custodial sentence should be imposed on the defendant." This statement is not sufficiently detrimental to merit a remand, particularly since the sentencing judge has stated in an affidavit that he did not rely upon it. As to defendant's objection that no reasons were given for the sentence imposed, no case law or rule mandates that reasons be given.

Affirmed.

## APPENDIX B

**Order of the Supreme Court of New Jersey Denying Certification**

SUPREME COURT OF NEW JERSEY

C-22 SEPTEMBER TERM 1973

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STATE OF NEW JERSEY,

Plaintiff-Respondent,

*vs.*

FRANK STARR,

Defendant-Petitioner.

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To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied.

WITNESS the Honorable Pierre P. Garven, Chief Justice, at Trenton on the 19th day of September, 1973.

Clerk of the Supreme Court